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Caught between Scalia and the Deep Blue Lake: The Takings Clause and Transferable Development Rights Programs

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Note

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Land use takings law has largely become an exercise in line-drawing. Although the Supreme Court has attempted numerous times to delineate the lawful scope of government regulation under the Takings Clause,[1] its attempts have generally produced constitutionally ambiguous lines. Despite its many failures to clarify takings jurisprudence, the Court actually established an analytically firm line in *Lucas v. South Carolina Coastal Council*, creating the "categorical takings" or "takings per se" rule.[2] The categorical takings rule states that the government must compensate landowners if regulations completely deprive landowners of the value of their land.[3]

While simple enough on its face, the categorical takings rule does not always prove easy to apply. In particular, innovative new land use tools have not lent themselves well to current takings analyses. Because of their reliance on free-market concepts, transferable development rights (TDR) programs, an innovative land use regulation device, complicate the analysis of whether a taking has occurred. As will be discussed at length in this Note,[4] TDR programs blur the bright line drawn

* J.D. 1998, University of Minnesota Law School.

1. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (establishing that a regulation that "goes too far" may violate the Takings Clause).

2. 505 U.S. 1003, 1015 (1992).

3. *See id.*

4. The term "transferable development rights," sometimes used interchangeably with "transferable development credits," refers generally to regulatory programs that involve the trading of property rights in a free market. The actual implementation of programs may vary widely. *See infra* notes 128-37 and accompanying text (discussing various purposes of and approaches to TDRs).

in *Lucas* by confusing the issue of exactly what it is that the line is supposed to divide.

The Supreme Court recently touched on a takings challenge to a TDR program in *Suitum v. Tahoe Regional Planning Agency*.[5] Although the *Suitum* decision concerned only a jurisdictional ripeness issue,[6] the division of the Court's opinion raised questions about how a TDR scheme would fare under a substantive takings analysis. Three Justices, in a concurring opinion written by Justice Scalia, dissented to the portion of the majority opinion that considered whether the plaintiff should have to sell her development rights in order to ripen her takings claim.[7] Justice Scalia objected to this analysis because it necessarily assumed that TDR programs could prevent a taking,[8] arguing instead that TDRs' single role lies in determining whether the property owner has received "just compensation" after a taking has occurred, not whether the taking has occurred in the first place.[9] In other words, for Justice Scalia and the concurring Justices, no imaginable TDR program could constitutionally deflect a takings claim.

Evaluating takings claims against TDR programs depends in part on how one characterizes TDRs. Proponents claim that TDRs represent real property rights, and therefore constitute a use of real property.[10] TDR opponents, on the other hand, argue that development rights are not property rights at all, but instead only represent arbitrary administrative variances from land use restrictions.[11] This confusion has left some govern-

5. 117 S. Ct. 1659 (1997). The Court overruled a Ninth Circuit opinion which held that Suitum's claim was unripe because she had not exhausted her administrative remedies by attempting to sell her development rights. *See* Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d 359, 362-63 (9th Cir. 1996), *vacated*, 117 S. Ct. 1659 (1997). The Supreme Court held that a market-based determination of the availability and adequacy of development rights provided a "final decision" upon which the Court could adjudicate. *See Suitum*, 117 S. Ct. at 1662.

6. *See Suitum*, 117 S. Ct. at 1662.

7. *See id.* at 1670 (Scalia, J., concurring).

8. *See id.*

9. *See id.*

10. *See, e.g.*, Steven R. Levine, Comment, *Environmental Interest Groups and Land Regulation: Avoiding the Clutches of* Lucas v. South Carolina Coastal Council, 48 U. MIAMI L. REV. 1179, 1210 (1994) (hypothesizing that TDRs leave landowners an economically viable use of their land, thereby avoiding a categorical takings claim under *Lucas*).

11. *See, e.g.*, *Suitum*, 117 S. Ct. at 1670-71 (Scalia, J., concurring).

ments that use TDR programs uncertain as to the constitutional character of their regulatory activities.[12]

This Note considers whether TDR programs could constitutionally deflect a takings claim that would otherwise succeed under *Lucas*. It assumes, for analytical purposes, a land use regulation that would constitute a taking under *Lucas* but for the existence of TDRs.[13] Part I explores takings law with respect to land use. Part II outlines the theory and application of TDR programs. Part III sketches the scarce treatment that the Court has given TDR programs in takings contexts. Part IV analyzes the effect of a TDR program on regulations that would otherwise result in a taking. This Note concludes that TDR programs may in fact prevent takings under a *Lucas* analysis.

I. REGULATORY TAKINGS

A. ORIGINS AND DEVELOPMENT OF THE TAKINGS CLAUSE

The Fifth Amendment to the United States Constitution forbids the taking of private property "for public use, without just compensation."[14] In its original conception, this clause required compensation only when the government used its eminent domain power to physically seize private lands for public

12. *See, e.g.*, James E. Holloway & Donald C. Guy, Suitum v. Tahoe Regional Planning Agency: *Its Impact on the Final Decision Requirement and Its Potential Implications for* Lucas' *Per Se Rule and the Role of TDRs in Takings Analysis*, 20 ZONING AND PLAN. L. REP. 65, 70 (1997) ("For municipalities and state agencies that have used (and are still using) TDRs, the unsettled status of TDRs in taking analysis leaves much uncertainty regarding the constitutional validity of land use and other regulatory schemes."). Doubts have manifested themselves in planning meetings and conferences in communities that are considering new TDR programs. Interview with Jean Coleman, Planner for Biko Associates, St. Paul, Minn. (Nov. 10, 1997).

Of course, the benefits of TDR programs extend beyond the deflection of takings claims. TDR programs also achieve a number of other land use goals. *See infra* notes 128-37 and accompanying text.

13. TDR programs come in a wide variety of forms, while takings law depends heavily on specific facts.

14. U.S. CONST. amend. V. This clause is commonly known as the "Takings Clause," the "Just Compensation Clause," or the "Eminent Domain Clause." *See* Jennifer L. Bradshaw, Note, *The Slippery Slope of Modern Takings Jurisprudence in New Jersey*, 7 SETON HALL CONST. L.J. 433, 434 n.5 (1997).

purposes.[15] Properly exercised government powers that did not physically seize private property did not result in prohibited takings.[16]

The scope of the Clause was eventually expanded to include regulations that resulted in a physical invasion of property, even where the government did not actually seize title.[17] The Court did not require compensation, however, when governments restricted property rights in order to prevent a noxious use, nuisance, or harm to the community,[18] because the right to own property did not include the right to use it in a way that harmed others.[19] Governments also had the power to

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15. *See* Good v. United States, 39 Fed. Cl. 81, 94-95 (1997) ("Early interpretations of the Takings Clause limited its application to actual government seizures of private property.").

A primary motivation for the Just Compensation Clause grew out of the English concern, dating back to the Magna Carta, with the Crown's practice of claiming possession of lands without compensating the original owner. Landowners had no absolute rights to use the land as they wished. Feudal notions of the ownership of property held that the land was owned by the Crown, and private individuals used the land only at the pleasure of the Crown. *See* William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 697 (1985). Therefore, the state had the sovereign power to abrogate those property rights.

The feudal notions of property law remained a part of early American law. *See* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081-82 (1993). Property owners acknowledged that by submitting to government intrusion, they were in fact contributing to the common good, including their own. *See id.* Benjamin Franklin stated that "Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it . . . its contributions therefore to the public Exigencies are . . . to be considered . . . the Return of an obligation previously received, or the Payment of a Just Debt." Treanor, *supra*, at 700.

16. *See* Northern Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1878).

17. *See* Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166, 180-81 (1871) (requiring compensation for flooding of private property caused by dam). There is no de minimis or public need exception for physical takings. Even the smallest physical intrusion for the greatest public purpose requires compensation. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); *see also* United States v. Causby, 328 U.S. 256, 265 (1946) (holding that a physical invasion of airspace constituted a compensable taking).

18. *See, e.g.*, Miller v. Schoene, 276 U.S. 272, 280-81 (1928) (upholding law requiring destruction of infected red cedar trees that threatened nearby apple orchards); Hadacheck v. Sebastian, 239 U.S. 394, 412-14 (1915) (upholding law prohibiting brickyard in residential area); *see also* Bradshaw, *supra* note 14, at 441 (noting the Supreme Court's reasoning that an owner's use of land may not injure the community).

19. *See Hadacheck*, 239 U.S. 394 (1915).

regulate land use as a means of preventing generalized harm to the community, even if the regulation affected private property rights that did not of themselves constitute harmful or noxious uses.[20] In other words, although a property owner suffered economic loss caused by government regulatory activities, regulations not requiring government to physically invade a landowner's property historically were not deemed to constitute takings.[21]

In 1922, the Court first recognized a "regulatory taking" in *Pennsylvania Coal Co. v. Mahon*.[22] In *Mahon*, the Court noted that a regulation that too greatly restricted the right to use land resulted in a taking, even though no physical invasion had taken place.[23] Although maintaining that the government could validly reduce the value of private property through regulation,[24] the Court held that a regulation that diminished the value of property could simply "go[ ] too far,"[25] thus requiring the government to compensate the injured landowner for the property value diminution caused by its regulatory activities.[26] The Court has not offered a clear test for determining when a regulation goes "too far," preferring instead to tackle takings issues largely on a case-by-case basis.[27]

B. RATIONALES BEHIND THE TAKINGS CLAUSE

The Court may have difficulty articulating a clear regulatory takings formula because of the variety of rationales it has

20. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926) ("The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful.") (quoting City of Aurora v. Burns, 149 N.E. 784 (Ill. 1925)).

21. *See Lucas*, 505 U.S. at 1014 (citing Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871)); *see also* Treanor, *supra* note 15, at 694 (discussing past conceptions of the Just Compensation Clause).

22. 260 U.S. 393, 414-15 (1922).

23. *See id.* at 414-16.

24. *See id.* at 413.

25. *See id.* at 415.

26. *See id.* at 413 (stating that if the diminution in property value reached a "certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act").

27. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (explaining that, in the past, the Court generally eschewed any "set formula" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries").

advanced for the Takings Clause.[28] The first rationale, presented in *Mahon*, reasoned that eliminating the valuable use of property may have the same effect as a physical appropriation.[29] In *Mahon*, Justice Holmes applied a balancing test that measured the social utility of the valuable use of a property and compared it to the social utility of regulating the use of such property.[30] Holmes noted with approval the "average reciprocity of advantage" test, asserting that landowners do not have a takings claim if they enjoy benefits from the regulation that offset the burdens they must bear.[31] The average reciprocity of advantage principle still maintains its validity as a rationale for zoning programs.[32]

The harm-benefit rule,[33] another early rationale offered for the Court's regulatory takings jurisprudence, has not maintained such validity. The harm-benefit rule upheld regulations that prevented a harm to the public, and invalidated regulations designed to confer a public benefit.[34] This rule attempted to distinguish between the valid government purpose of preventing noxious uses, and the invalid purpose of forcing one landowner to bear the cost of a common benefit. *Lucas* did away with the harm-benefit rule, characterizing the distinction between preventing harm and promoting benefit as illusory, a

28. *See* DANIEL R. MANDELKER ET AL., FEDERAL LAND USE LAW: LIMITATIONS, PROCEDURES, REMEDIES § 2A.03 (1998).

29. *See Mahon*, 260 U.S. at 414-15.

30. *See id.* at 414; MANDELKER ET AL., *supra* note 28, § 2A.04 (citing D. MANDELKER, LAND USE LAW § 2.06 (3d ed. 1993)).

31. *See Mahon*, 260 U.S. at 415.

32. Zoning provides the most common example of a regulation that secures an overall advantage for the community that benefits landowners, despite the restrictions on the use of individual parcels. *See* MANDELKER ET AL., *supra* note 28, § 2A.03 ("While zoning at times reduces *individual* property values, the burden is shared evenly, and it is reasonable to conclude that on the whole the individual who is harmed by one aspect of the zoning will be benefited by another.") (quoting *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting)).

33. Also known as the "noxious use" rule.

34. *See* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 638 F. Supp. 126, 136 (D. Nev. 1986), *vacated*, 911 F.2d 1331 (9th Cir. 1990) (quoting E. FREUND, THE POLICE POWER § 511, at 546-47 (1904)):

> It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.

distinction "often in the eye of the beholder."[35] The Court recognized that, as a practical matter, it could not objectively tell the difference between a regulation that prevented a harm and one that conferred a benefit.[36]

Although the practical applications of the harm-benefit rule have been abandoned, the reasons underlying its component parts still shape takings jurisprudence.[37] The harm-benefit rule involved two fundamental beliefs: (1) that a landowner could not lawfully use his property in a way that harmed others; and (2) that the government should pay for benefits that the entire community enjoys, rather than forcing individual landowners to bear the entire cost. This rule comports with the philosophy that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[38] Although this philosophy is clear enough in theory, the Court has not developed a set formula for determining when the economic costs of the public good must be borne by the government, rather than borne disproportionately by individuals.[39]

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35. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1024 (1992). For example, one person may see an open space preservation rule as a prevention of the harm arising from urban sprawl, while another may see it as conferring the benefit of scenic views upon the community. *Cf. id.* at 1024-25. Justice Scalia reconciled the Court's earlier use of the harm-benefit rule with its demise in *Lucas* by explaining:

> When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation.

Id. at 1026; *see also* MANDELKER ET AL., *supra* note 28, § 2A.03.

36. *See Lucas*, 505 U.S. at 1026.

37. *See* MANDELKER ET AL., *supra* note 28, § 2A.03.

38. Armstrong v. United States, 364 U.S. 40, 49 (1960). The Court stated a similar philosophy in *Lucas*, expressing a concern that private land should not be pressed into public service. *See Lucas*, 505 U.S. at 1018.

39. The Court admits that it "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 103, 124 (1978) (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

C. REGULATORY TAKINGS TESTS

1. Balancing Tests

Although many factors may affect a takings analysis, two factors hold "particular significance":[40] "the character of the governmental action,"[41] and the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[42] At its most basic level, the Takings Clause prohibits regulations that either "do[ ] not substantially advance legitimate state interests . . . or den[y] an owner economically viable use of his land."[43] While many forms of regulation lead to *some* diminishment in property values,[44] not all such regulation will result in a taking, because landowners do not have a right to the "highest and best use" of their property.[45] Instead, the Court employs a balancing test between the landowner's interest and the benefits produced by the regulation.[46]

Evaluating the purported benefits of regulation requires an examination of the purposes behind the regulation and the means chosen to effectuate that purpose. A regulation advances legitimate state interests if a "sufficient nexus" exists between a valid governmental purpose and the means of regulation applied to advance that purpose.[47] A nexus exists if the conditions imposed bear a "rough proportionality" to the pur-

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40. *Id.*

41. *Id.*

42. *Id.*

43. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), *cited in Lucas*, 505 U.S. at 1016.

44. *See Penn Central*, 438 U.S. at 124-25 (providing examples of government actions that may diminish economic value, such as taxation and other forms of regulation).

45. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

46. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

47. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987). The "nexus" ensures that the regulation is constitutionally proper. Because no property owner may use her land in a way that harms her neighbors, *see supra* note 19 and accompanying text, it follows that the government may impose restrictions to prevent property uses that harm the community. However, if the measures applied by the government do not further the claimed state interest, this justification disappears. *See Nollan*, 483 U.S. at 837.

poses of the regulation.[48] Courts have generally allowed governments a good deal of leeway in defining when a regulation advances the public interest.[49] The Court gives wide deference to those regulations that promote "the health, safety, morals, or general welfare,"[50] and has upheld land use regulations even if they "destroyed or adversely affected real property interests."[51]

The other prong of the balancing test, the property owner's interest, is analyzed in terms of the economic impact of the regulation.[52] Under *Penn Central*, the question turns mostly on whether the owner may realize a reasonable use of or return on the property,[53] based on whether the owner is allowed a reasonable return on distinct, investment-backed expectations.[54] The value that the owner retains, rather than the value that the owner has lost, determines whether the owner receives a reasonable return.[55]

Courts consider the entire regulatory climate in determining whether a landowner was justified in her expectation to use the property in a certain way.[56] The rationale for this rule, in part, is that "one who invests in property with the knowledge of a restraint assumes the risk of economic loss."[57] Even a

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48. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment.").

49. *See Euclid*, 272 U.S. at 388-90.

50. *See Penn Central*, 438 U.S. at 125.

51. *Id.*; *see also* Nectow v. Cambridge, 277 U.S. 183, 188 (1928) (upholding a land use regulation that substantially eliminated the economic value of land). As the Court in *Penn Central* notes, zoning is the "classic example" of regulation that can greatly diminish economic value but that generally does not require compensation. *See Penn Central*, 438 U.S. at 125.

52. *See* Agins v. City of Tiburon, 447 U.S. 225, 260 (1980); *Penn Central*, 438 U.S. at 124.

53. *See Penn Central*, 438 U.S. at 124-25.

54. *See id.* The expectations must be distinct and articulable, rather than merely hypothetical or possible. The property owner is not entitled to compensation for all possible uses of the property, but only those that he or she might reasonably have expected to realize. *See id.*

55. *See id.* at 136.

56. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013 (1984). The Court in *Monsanto* declined to limit its inquiry into the regulatory climate to a consideration of the law in effect at the time of purchase, holding that landowners speculating for profit bore the inherent risk of a change in regulatory climate. *See id.; see also* Good v. United States, 39 Fed. Cl. 81, 109 (1997).

57. *Good*, 39 Fed. Cl. at 109 (citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994)).

clearly reasonable expectation of use does not mean a plaintiff will prevail.[58] Takings challenges have failed even where the challenged regulation prohibited a previously allowed beneficial use, even if there was substantial economic harm.[59] According to the Supreme Court, the state may make "a choice between the preservation of one class of property and that of [another]."[60]

2. *Lucas* Per Se Takings

Since the time of *Penn Central* and *Agins*, the Supreme Court has expressly identified two circumstances in which a single factor alone might determine the outcome of a takings case:[61] (1) denial of all economically viable use;[62] and (2) physical invasions.[63] Of these, the categorical takings rule has played a significant role in TDR takings cases. Under *Lucas*, regulations that effectively "den[y] all economically beneficial or productive use of land" constitute per se takings.[64] In *Lucas*, the Supreme Court ruled that regardless of any legitimate governmental interest, a regulation that removes all economically viable use constitutes a taking.[65] Once a categorical taking has occurred, the government must compensate the landowner for the full value of the property lost.[66]

The rationale behind the *Lucas* rule is relatively straightforward: as Justice Scalia put it in the majority opinion, a complete denial of productive use amounts to the equivalent of a physical taking, at least from the landowner's point of view.[67] When the government denies all use without compensating the

58. *See Penn Central*, 438 U.S. at 124-25.

59. *See id.*

60. Miller v. Schoene, 276 U.S. 272, 279 (1928). The Court also held that "the State [did] not exceed its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public." *Id.*

61. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

62. *See id.*

63. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (holding that a government regulation that authorizes a permanent physical occupation of property so resembles the exercise of eminent domain power that it alone constitutes a taking).

64. *Lucas*, 505 U.S. at 1015.

65. *See id.* at 1026-27.

66. *See id.* at 1019 n.8.

67. *See id.* at 1017.

landowner, it is "less realistic to indulge [the Court's] usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,'"[68] and more likely that "private property is being pressed into some form of public service."[69]

Scalia's rationale eliminates the character of the government action as a factor.[70] In other words, no exercise of the police power is so compelling as to allow the complete deprivation of property values without compensation.[71] The *Lucas* per se rule does not extend, however, to regulations that merely make explicit a common law nuisance restriction.[72] The Court differentiated these regulations by arguing that they only prohibit uses that the property owner never had in the first place.[73]

3. Unanswered Questions

Lucas necessarily requires a determination of the extent of a regulation's economic impact upon a landowner.[74] In determining economic impact, the Court has used a fractional comparison of the diminution resulting from the regulation over

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68. *Id.* (quoting *Penn Central*, 438 U.S. at 124). Other commentators have explained this phenomenon in terms that fit well with the "reciprocity of advantage" theory. *See* Joseph W. Trefzger, *Efficient Compensation for Regulatory Takings: Some Thoughts Following the* Lucas *Ruling*, 23 REAL EST. L.J. 191, 203-04 (1994). Landowners who are denied all use of their land receive no reciprocal advantages from the regulation because they do not get to share in the benefits of the regulation. *See id.* at 204.

69. *Lucas*, 505 U.S. at 1018.

70. *See* Marilyn Phelan, *The Current Status of Historical Preservation Law in Regulatory Takings Jurisprudence: Has the* Lucas *"Missile" Dismantled Preservation Programs?*, 6 FORDHAM ENVTL. L.J. 785, 813-14 (1995).

71. *See Lucas*, 505 U.S. at 1029. Justice Scalia acknowledged that this rule would in some cases create inequity between property owners who received full compensation, and those who suffered a significant (but not total) deprivation and received nothing. *See id.* at 1019 n.8.

72. *See id.* at 1029-30. Not all complete denials of specific uses result in a taking. The state may prohibit uses that would not be permitted under "background principles of nuisance and property law." For example, property owners could never use their land in a way that resulted in a nuisance, so a regulation forbidding nuisances cannot constitute a taking. Rather, such a regulation merely makes explicit what was previously implicit in the law, by expressly prohibiting a use that the property owner never had in the first place. *See id.* Determining when a use is prohibited at common law requires an examination of the underlying property law of the state in question. *See id.*

73. *See id.*

74. *See id.* at 1016 n.7.

the full unregulated value of the parcel.[75] A simpler way to express this calculation is simply to subtract the value of the property rights that the regulation removes from the total value of the land. If the result is zero, a categorical taking has resulted.[76] Suppose that in *Lucas*, for example, the land in question had a value of one million dollars if developed, and zero value if left undeveloped.[77] The regulation removed the right to develop the property, and thus also removed the entire million dollars' worth of value. If, on the other hand, the land had possessed scenic value of $500,000 (even if undeveloped), then prohibiting the development would not result in a total diminution, because the owner still would have $500,000 worth of use remaining in the property.

Unfortunately, the Court has not articulated a clear means of calculating the full unregulated value of property.[78] The Court in *Lucas* expressly declined to define what property interest constitutes the denominator of the takings equation.[79] The property interests may arguably be divided in a number of ways,[80] including horizontally,[81] vertically,[82] temporally,[83] and

75. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property . . . ."); *see also Lucas*, 505 U.S. at 1016 n.7.

76. *See Lucas*, 505 U.S. at 1015 ("[W]e have found categorical treatment appropriate . . . where regulation denies all . . . productive use of the land."). The use of a fractional analysis would result in a ratio or percentage of value by which the regulation diminishes the value of the land. This suggests that there is some percentage other than 100% that would be of significance. Since *Lucas* only ruled on complete diminutions, this suggestion is incorrect.

77. Mr. Lucas actually paid $975,000 for the lots in question. *See id.* at 1006. The South Carolina Supreme Court found that Mr. Lucas had been deprived of $1,232,387.50. *See id.* at 1009.

78. *See id.* at 1016 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule does not make clear the 'property interest' against which the loss of value is to be measured."); *see also* John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1535-37 (1994).

79. *See Lucas*, 505 U.S. at 1016 n.7.

80. *See* Fee, *supra* note 78, at 1537.

81. *See id.* at 1537 n.7 (describing horizontal interests as the most common way of dividing property rights, "meant to include any division into parcels, lots, or the like, as may be shown on a map").

82. *See id.* at 1537 n.8 (offering examples of vertical divisions of a parcel, including air rights, surface rights, or subsurface rights).

83. *See id.* at 1537 n.9 (defining temporal divisions as "the division of property interests into present and future estates").

functionally.[84] As a general rule, takings cases have not embraced these distinctions; parcels of property are generally defined in terms of a cohesive whole, both in terms of physical space and as a bundle of rights.[85] Some flexibility exists when defining property interests horizontally[86] and temporally.[87] The Court has found less flexibility in other contexts, ruling that a property owner may not divide land into separate vertical[88] or functional interests in order to claim a taking.[89] Even if a regulation completely extinguishes an aspect of property ownership, the test remains whether the regulation goes too far with respect to the entire bundle.[90] Thus, a regulation that completely destroys the use of ten percent of the property is a ten percent diminution of the whole, not a full taking of the ten percent.

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84. *See id.* at 1537 n.10 (describing functional divisions of property as including easements, rights of way, and servitudes).

85. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). The court noted:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole* . . . .

Id. (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978)). This generalization applies only to regulatory takings. A physical appropriation of even a small portion of property results in a taking. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

86. Depending on the factual situation, the parcel may be divided into separate physical sections. Some factors that may affect this decision include the degree of continuity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which a portion of the property may enhance the value of other lands. *See* Fee, *supra* note 78, at 1547.

87. The Court has held that even a temporary taking is a compensable taking. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 317-20 (1987).

88. *See Keystone*, 480 U.S. at 500 (refusing to recognize a taking of subsurface mining rights for specific pillars of coal separately from the land as a whole); *Penn Central*, 438 U.S. at 130-31 (refusing to recognize a taking of the air rights over a building without regard to the building below).

89. *See* Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (refusing to recognize a taking when a regulation prohibited sale of eagle feathers, because other uses of the property remained).

90. *See Andrus*, 444 U.S. at 65-66 ("[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

II. TRANSFERABLE DEVELOPMENT RIGHTS

TDR programs provide a regulatory mechanism for steering development away from sites that are not environmentally well-suited for development to other, more appropriate sites.[91] Professor John Costonis, in the seminal article on the modern use of TDRs, described them as a means to protect a "low density resource" from "high density use."[92] TDR programs do not introduce radical new concepts into land use regulation. They build on and use a number of previously existing land use regulations.[93]

A. A BRIEF HISTORY OF LAND USE REGULATIONS

The right to use property does not generally include the right to use it to the detriment of other property owners.[94] Ancient common law, for example, first recognized the nuisance doctrine, prohibiting noxious or disturbing uses that diminished the value of other lands.[95] Although nuisance doctrine adequately met community needs for centuries, the growth of cities and suburbs brought conflicting uses into close proximity and required greater land use controls.[96] As a result of the increased conflict, the prevention of nuisances grew beyond a private right of action into a legitimate exercise of the governmental police power.[97] Demands that governments act proac-

91. *See* LINCOLN INSTITUTE OF LAND POLICY & REGIONAL PLAN ASSOCIATION, TRANSFER OF DEVELOPMENT RIGHTS FOR BALANCED DEVELOPMENT CONFERENCE REPORT III (1998).

92. John Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973). Other reasons to transfer development include a desire to protect a valuable historic or scenic area in an essentially unchanged form. *See, e.g.*, *Penn Central*, 438 U.S. at 107.

93. *See infra* Part II.B.

94. *See* DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE (2d ed. 1994).

95. *See* DANIEL R. MANDELKER, LAND USE LAW 98 (4th ed. 1997).

96. *See* 1 ANDERSON'S AMERICAN LAW OF ZONING § 1.03, at 7-8 (Kenneth H. Young ed., 4th ed. 1996). Burgeoning urban areas provided an especially sharp lesson in uncontrolled growth, as landowners competed to erect skyscrapers sooner than and larger than their neighbors in order to win the fight for light and air. *See* EDWARD M. BASSETT, ZONING 315 (1922).

97. *See* BASSETT, *supra* note 96, at 319-20 (describing the growing acceptance of the use of the police power in land use regulation). The right of governments to prevent nuisances extended even to the restriction of activities that existed before communities "came to the nuisance." *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding regulation that prohibited brickmaking factories, as noxious uses, in residential areas).

tively to control and channel the new urban growth led to the development of modern land use regulation based on zoning.[98]

Zoning provisions may designate the lawful use of property in a particular area, imposing restrictions such as lot size, square footage limitations, height restrictions, and setback distances from roads.[99] Early zoning ordinances envisioned a standard growth model, a grid of proportionate square lots.[100] This scheme worked well in dense urban areas, but lacked the flexibility to control sprawling growth in suburban and rural landscapes.[101] The "first wave" of land use revisions impacted not only the types of uses allowed, but also the manner in which those developments occurred.[102] Some of these revisions, such as comprehensive planning,[103] floating zones,[104] cluster

98. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1922). The ordinance at issue in *Euclid* focused on the protection of single-family residences from other encroaching uses such as industrial, commercial, or multi-dwelling units. *See id.* at 379-80. *Euclid* held that restrictions on such uses constituted a legitimate use of state power and was not a taking. *See id.* at 395.

99. *See, e.g., id.* at 379-83 (setting forth the details of one town's zoning ordinance).

100. *See id.*

101. See James Poradek, Note, *Putting the Use Back in Metropolitan Land-Use Planning: Private Enforcement of Urban Sprawl Control Laws*, 81 MINN. L. REV. 1343, 1348-49 (1997) ("By emphasizing low-density development and a wide separation of uses, suburban zoning rejected schemes of compact, integrated development and encouraged sprawling development.").

102. *See* Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 568 (1992) (describing two waves of zoning revisions).

103. *See* Poradek, *supra* note 101, at 1350-51.

104. Floating zone ordinances describe the characteristics that the zone will have, but do not designate a location. The zone comes into being and attaches to an area when the governing board finds a situation that meets the criteria in the ordinance. *See* CALLIES ET AL., *supra* note 94, at 69. While there is some split, most jurisdictions allow floating zones as long as they are not arbitrary or inconsistent with the comprehensive plan of the district. *See, e.g.*, Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 736 (N.Y. 1951) (upholding a floating zone ordinance); Huff v. Board of Zoning Appeals, 133 A.2d 83, 92 (Md. 1957) (upholding a floating zone ordinance on grounds that it was not "arbitrary, capricious, or unreasonable"). *But see* Eves v. Zoning Bd. of Adjustment, 164 A.2d 7, 11 (Pa. 1960) (holding a floating zone ordinance invalid because it made land use impermissibly dependent upon landowner applications). Care must be taken to differentiate floating zones from "spot zoning," which impermissibly amends the zoning code in a limited area. *See* CALLIES ET AL., *supra* note 94, at 69.

development,[105] or planned unit developments,[106] attempt to overcome the rigidity of "Euclidean zoning" in favor of flexible standards.[107]

B. TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS

The "second wave" of land use revisions[108] introduced market based regulatory methods into traditional command and control schemes.[109] Market based regulation attempts to create financial incentives for desirable behavior, rather than simply outlawing undesirable behavior.[110] TDR programs replace or supplement command and control zoning with a tradable rights program that attempts to shift development into desired patterns.[111]

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105. Cluster developments attempt to cluster development closer together than is usually permitted, allowing the consolidation of open space for other purposes, such as parks or agriculture. *See* JOHN S. WILSON ET AL., COMPREHENSIVE PLANNING AND THE ENVIRONMENT: A MANUAL FOR PLANNERS 173-74 (1979).

106. Planned unit developments are areas in which certain planning goals are established but the exact implementation is flexible. The community may set certain goals through the planning process and designate goals for growth. For example, the community may designate that a certain percentage of growth be dedicated to residential, commercial, or other uses. *See* CALLIES ET AL., *supra* note 94, at 138.

107. *See id.*

108. *See* Kayden, *supra* note 102, at 568 (describing two waves of zoning revisions).

109. *See id.* at 568-79 (describing several regulatory programs using market approaches to achieve regulatory goals). Economic incentives have been used to address a wide range of environmental and resource protection goals within a regulatory scheme. *See* JOHN H. DALES, POLLUTION, PROPERTY AND PRICES (1968); Richard B. Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV. 1 (1985); *Law and Economics Symposium: New Directions in Environmental Policy*, 13 COLUM. J. ENVTL. L. 153 (1988). A common example of market based regulation is in the area of air pollution. The federal Clean Air Act sets a ceiling on pollution by selling a number of "pollution credits." *See* 42 U.S.C. §§ 7651-7651o (1994). Industries may buy credits at auction or may trade with other industries. *See id.* In this way, the amount of pollution remains constant, but is distributed to the most economically viable use. *See* Adam J. Rosenberg, *Emissions Credit Futures Contracts on the Chicago Board of Trade: Regional and Rational Challenges to the Right to Pollute*, 13 VA. ENVTL. L.J. 501, 503-10 (1994) (describing pollution trading plan).

110. *See* Kayden, *supra* note 102, at 566 (discussing movement from command and control model to market based model of environmental regulation).

111. *See id.*

TDR programs are based on the theory that some rights of property ownership may be separated from others.[112] Property ownership is treated like a "bundle of sticks."[113] Property owners have a set of rights that come with the ownership of land, each of which can be separated from the other.[114] Leasing is a simple example of a property owner dividing his "sticks," in which the owner retains the title of the land, but gives someone else the right to possess and use the land.[115] Another familiar example is separating the ownership and use of the surface land from the mining rights to minerals found below.[116] In much the same way, the right to develop property in a certain way may be separated from the right to possess the land.

The common law of property recognized this through easements, which gave one person a non-possessory interest in someone else's property.[117] In other words, the easement holder had the right to use the property or restrict the use of it even though he did not own the land itself.[118] A modern, specialized form of easement called a conservation easement deals particularly with restrictions on development for conservation purposes.[119] Conservation easement holders purchase the right to develop property in certain ways and remove that right from the property.[120]

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112. *See* John J. Delaney et al., *TDR Redux: A Second Generation of Practical Legal Concerns*, 15 URBAN LAW. 594, 596 (1983).

113. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

114. *See Loretto*, 458 U.S. at 425 (noting that the rights to "possess, use and dispose of" property are separate strands in the bundle).

115. *See* CALLIES ET AL., *supra* note 94, at 242.

116. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (dealing with situation in which mining companies owned mineral rights to underground coal separate from the property rights of the surface owners).

117. *See* CALLIES ET AL., *supra* note 94, at 244.

118. *See id.*

119. *See, e.g.*, MINN. STAT. § 84C.01 (1996). The statute defines a conservation easement as:

> a non-possessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreation, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

120. This concept has been used by governments and conservation groups in purchase of development rights (PDR) programs, a precursor to TDRs. *See* TOM DANIELS & DEBORAH BOWERS, HOLDING OUR GROUND: PROTECTING AMERICA'S FARMS AND FARMLAND 145 (1997). PDR operates just as the name

TDR programs carry the concept one step further. Because development rights may be removed from a property, it seems logical that they may be added to a property. Rather than simply buying the development rights from property owners, governments establish a market through which property owners may trade development rights amongst themselves.[121] While the details of TDR programs vary, most have four basic components.[122] First, they designate a preservation area, usually called the sending area, from which development is discouraged or transferred.[123] Second, they establish a designated growth area, known as the receiving area, to which development rights are transferred.[124] Receiving areas are those in which further development does not present a threat, and usually have already been developed to some degree.[125] Landowners in receiving areas may purchase development rights in order to develop their property to a greater extent than would normally be allowed under local land use regulations.[126] Third, TDR programs have a pool of development rights that are legally separated from the land in the sending area.[127] Finally, TDR programs establish a procedure by which development rights may be transferred from one location to another.

TDR programs vary in their specifics. Governments may either create a voluntary incentive program[128] or a mandatory

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suggests. The development rights of a piece of property, in the form of an easement, are purchased and held separately from the ownership of the land itself. *See id.* Subsequently, the landowner may not develop the land in a way covered by the easement, because he literally has sold off the right to do so. *See id.*

121. *See* Costonis, *supra* note 92, at 85-86 (describing the transfer of development rights as "break[ing] the linkage between particular land and its development potential by permitting the transfer of that potential").

122. *See* DANIELS & BOWERS, *supra* note 120, at 174.

123. *See id; see also* AMANDA JONES GOETTSEGEN, PLANNING FOR TRANSFER OF DEVELOPMENT RIGHTS: A HANDBOOK FOR NEW JERSEY MUNICIPALITIES 29-30 (1992) (identifying criteria to consider when designating sending areas). Some of the uses of TDR programs have included preservation of historic buildings, farmland, open space, or coastlines.

124. *See* DANIELS & BOWERS, *supra* note 120, at 174.

125. *See* GOETTSEGEN, *supra* note 123, at 9-10 (identifying criteria to consider when designating receiving areas).

126. *See id.* at 46. For example, if a landowner owned a lot that was zoned for one residence, he could, by purchasing a development right, build two residences on the lot.

127. *See* DANIELS & BOWERS, *supra* note 120, at 174.

128. Voluntary programs attempt to use financial incentives to preserve land, and do not prohibit development in sending areas. *See, e.g.*, N.J. STAT.

program that prohibits development in sending areas.[129] Sending and receiving areas may be designated on a zoning or a permit basis.[130] Zoning-based TDR programs designate broad sending and receiving areas through the standard zoning process,[131] and generally attempt to protect large tracts of open space[132] or agricultural land.[133] In contrast, permit-based programs do not identify broad sending areas, but identify characteristics or criteria that determine whether a particular parcel may be developed.[134]

The exact form of development rights varies with each specific TDR program. For programs designed to preserve historic sites, the property owner might receive air rights that may be used to add size to a different building.[135] For programs that protect residential or agricultural open space, the TDRs might be measured simply in terms of a number of building units per acre.[136] The rights transferred can also be very complicated,

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ANN. § 13:18A-30 (West 1991) ("Pinelands Development Credit Bank Act"). Voluntary programs allow property owners to sell development credits in return for placing a conservation easement on their land. *See* GOETTSEGEN, *supra* note 123, at 105-07. Because voluntary programs do not prohibit development, this Note focuses on the takings implications of mandatory TDR programs.

129. *See, e.g.*, MONTGOMERY COUNTY, MD., CODE §§ 59-C-1.39, C-9.6 to C-9.7 (1997).

130. *See* Robert A. Johnston & Mary E. Madison, *From Landmarks to Landscapes: A Review of Current Practices in the Transfer of Development Rights*, 63 J. AM. PLAN. ASS'N 365, 366-67 (1997).

131. *See id.*

132. *See, e.g.*, BOULDER COUNTY, COLO., LAND USE CODE art. 6 (1996).

133. *See, e.g.*, MONTGOMERY COUNTY, MD., CODE § 59-A-6.1 (1997).

134. The regulation at stake in *Suitum* provides a good example of a permit-based TDR program. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1662-63 (1997). Calculating the amount of development allowed at a site involves a complex process. The TRPA designates sending and receiving areas through a complex site evaluation known as the Individual Parcel Evaluation System (IPES) that uses scientific standards to determine the ecological effect of development on a given parcel. *See id.* Sites with an IPES score below a certain level may not be developed, but may transfer their development rights to sites with a score above a certain level. *See id.*

135. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 112 (1978).

136. *See* MONTGOMERY COUNTY, MD., CODE § 59-C-9.6 (1997). Montgomery County downzoned a sending area of 78,000 acres of agricultural land from one building right per five acres to one per twenty-five acres. *See* DANIELS & BOWERS, *supra* note 120, at 175. Then the county gave each property owner in the sending area one TDR for every five acres owned. *See id.* The county allowed landowners in the receiving areas to add one dwelling unit per acre by purchasing TDRs. *See id.*

especially in programs that use complex environmental analyses to determine site uses.[137]

TDR programs offer several advantages over traditional land use tools. TDR programs allow governments to avoid imposing harsh regulations on community members.[138] This is because TDR programs provide a method by which communities may spread the cost of regulation to the entire community, and particularly to those individuals that benefit.[139] In doing so, TDR programs prevent "free riders," individuals who avoid the costs of regulation but reap substantial benefits.[140] TDR programs also avoid the direct outlay of public funds to acquire easements or real estate.[141] By avoiding harsh regulation or inequitable profit, TDR programs provide a tool for implementing regulations that a community would otherwise lack the political will to enact.[142]

As land use regulations, TDR programs have been subjected to substantial judicial scrutiny. All land use programs, TDRs included, must be enacted properly within the powers of the government body.[143] TDR programs in particular must create development rights with some degree of certainty, stability, and proportionality to the original property rights that the regulations restricted.[144]

C. DEFINING TDRS IN LEGAL TERMS

The precise legal nature of TDRs has been the subject of some debate. Some courts and commentators have treated

137. The TRPA Regional Plan, for example uses a very complex site evaluation system to assign development rights. *See Suitum*, 117 S. Ct. at 1663.

138. *See* GOETTSEGEN, *supra* note 123, at 3.

139. *See id.* at 7.

140. *See* Trefzger, *supra* note 68, at 197.

141. *See* Delaney et al., *supra* note 112, at 596; DANIELS & BOWERS, *supra* note 120, at 171-72.

142. *See* GOETTSEGEN, *supra* note 123, at 3 (arguing that the need for TDRs stems from a lack of the political will to use traditional land use tools to their full potential).

143. *See* West Montgomery County Citizens Ass'n v. Maryland-National Capital Park & Planning Comm'n, 522 A.2d 1328, 1329 (Md. 1987) (striking down a TDR program because it was enacted improperly through the planning process, rather than through the properly delegated zoning process).

144. *See* Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y. 1976); *see also* Delaney et al., *supra* note 112, at 594.

TDRs as real property interests.[145] Others, most notably Justice Scalia, hold the belief that TDRs are arbitrary regulatory variances, albeit valuable ones.[146] One commentator has argued that some, but not all, TDR programs transfer true real property interests.[147] In this view, only those TDR programs that explicitly and legally define the development rights as true property interests, and protect them accordingly, actually transfer real property interests.[148]

Unfortunately, the Supreme Court has never directly addressed the issue of the validity and nature of TDRs the way that *Euclid* determined the validity of zoning.[149] Many courts have seemed to accept without question or analysis the assertion that TDRs are property interests, often citing to the "bundle of sticks" analogy.[150] Other courts have taken the Supreme Court's dicta on TDRs in *Penn Central*[151] as ratification of TDRs' status as property rights.[152]

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145. *See* Richard J. Lazarus, *Litigating* Suitum v. Tahoe Regional Planning Agency *in the United States Supreme Court*, 12 J. LAND USE & ENVTL. L. 179 (1997).

146. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1671-72 (Scalia, J., concurring); *see also* Lazarus, *supra* note 145, at 199-200.

147. *See* James M. Pedowitz, *Transferable Development Rights*, *in* AIR RIGHTS, AIR SPACE, AND TRANSFERABLE DEVELOPMENT RIGHTS 33, 35-36 (PLI Real Estate Law and Practice Course Handbook Series No. 269, 1985) (arguing that most development rights programs only transfer the "residual post-zoning development potential," rather than the true development rights that "consist of the unrestricted right to use and develop one's property").

148. *See id.* at 39-42. Pedowitz offers the Suffolk County, New York Plan as an example of a program that transfers true property rights, because it operates under a statute that recognizes the permissibility of severing true development rights, and it offers protection from loss by adverse possession or other law that may defeat the enforcement of an interest in real property. *See id.*; *see also* James M. Pedowitz, *Air Space and Air Rights*, *in* AIR RIGHTS, AIR SPACE, AND TRANSFERABLE DEVELOPMENT RIGHTS 57, 66-68 (PLI Real Estate Law and Practice Course Handbook Series No. 269, 1985) (citing N.Y. GEN. MUN. LAW § 247(4)).

149. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

150. *See, e.g.*, West Montgomery County Citizens Ass'n v. Maryland-National Capital Park & Planning Comm'n, 522 A.2d 1328, 1330 (Md. 1987) (summarily explaining TDR programs using the "bundle of sticks" analogy).

151. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1977).

152. *See, e.g.*, Good v. United States, 39 Fed. Cl. 81, 108 (1997) (citing *Penn Central*, 438 U.S. at 137) (stating that TDRs represent uses of property that should be considered when evaluating a takings claim); Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251 (N.J. 1991) (upholding development restrictions against takings challenge based in part on availability of TDRs);

Indirect evidence also exists to support the claim that development rights are property interests. Members of the real estate community treat them like property rights.[153] Realtors have listed and sold development rights like any other real property. They are appraised both as a part of their underlying parcel and as individual units. The insurance industry has also recognized TDRs as property, offering title insurance for development rights.

III. THE SUPREME COURT ON TDRS AND TAKINGS

The Court has had little occasion to rule directly on the validity of TDR programs as they relate to takings claims. Although the Court has dealt with TDRs in a takings context on at least two occasions, those cases have left the exact nature of TDRs "unsettled."[154] The Supreme Court touched on TDR programs in *Penn Central*, noting that TDRs "undoubtedly mitigate whatever financial burdens the law has imposed . . . and, for that reason, are to be taken into account in considering the impact of regulation."[155] The word "mitigate" remains without complete definition and does not answer the central question of whether TDRs prevent a taking or merely compensate for one.

Penn Central does not provide a clear answer to this question; in fact, the language in the case is contradictory on the issue.[156] At one point the Court notes explicitly that if there has been a taking, it would then consider "whether the transferable

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City of Hollywood v. Hollywood, Inc., 432 So. 2d 1332, 1338 (Fla. Dist. Ct. App. 1983) (citing *Penn Central*, 438 U.S. at 137).

153. *See, e.g.*, Gordon v. Flamingo Holding Partnership, 624 So. 2d 294, 297 (Fla. Dist. Ct. App. 1993) (holding that the removal of development rights from a property will impair an interest in collateral); Patricia Grace Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BALT. L. REV. 119, 164 (1993) (comparing TDRs to development agreements, stating that "[a] vested right in development represents one of the key sticks in the bundle that constitutes real property").

154. *See* Holloway & Guy, *supra* note 12, at 69.

155. *Penn Central*, 438 U.S. at 137. The Court in *Penn Central*, however, declined to rule on the validity of the TDR scheme standing alone. *See id.* at 122.

156. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1671 (1997) (Scalia, J., concurring) ("Whereas once there is a taking, the Constitution requires just (i.e. full) compensation, a regulatory taking generally does not occur so long as the land retains substantial (albeit not its full) value.") (citations omitted); *see also* Joseph D. Stinson, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 PACE L. REV. 319, 333 (1996).

development rights . . . constitute 'just compensation' within the meaning of the Fifth Amendment."[157] This clearly places TDRs on the compensation side of the line. Later in the opinion, however, the court seems to confuse the issue by referring to TDRs as compensation, but still considering them when determining the impact of the regulation.[158] Determining the impact of the regulation, the Court notes, goes toward determining if there has been a taking in the first place.[159] Then-Justice Rehnquist, in his dissenting opinion in *Penn Central*, left no doubt that he considered TDRs relevant to compensation only.[160] He noted that he would consider TDRs as relevant to the inquiry only if they "constitute a 'full and perfect equivalent for the property taken.'"[161]

The most recent attempt to apply takings law to a TDR program concerned regulations in the Lake Tahoe basin, an area long prized for its natural beauty.[162] In recent decades, the Tahoe area has grown greatly, and so has the strain on its delicate ecosystem.[163] The aggregate effect of various human activities threaten the environmental quality of the whole basin.[164] Hoping to preserve the quality of the lake, Congress directed the Tahoe Regional Planning Agency (TRPA)[165] to amend its comprehensive land use plan to minimize the adverse effects of increasing population.[166] The plan focused, in

157. *Penn Central*, 438 U.S. at 122. Since the court found that a taking had not occurred, it did not put this part of the test into practice.

158. *See id.* at 137.

159. *See id.* at 124-25.

160. *See id.* at 138 (Rehnquist, J., dissenting).

161. *Id.* at 152; *see also* Stinson, *supra* note 156, at 333.

162. *See* Carl R. Pagter & Cameron W. Wolfe, Jr., *Lake Tahoe: The Future of a National Asset—Land Use, Water, and Pollution*, 52 CAL. L. REV. 563, 564 (1964).

163. *See* Respondent's Brief at 2-4, Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659 (1997) (No. 96-243).

164. A combination of factors contributed to the degradation of the environmental quality of the area, including water use, disposal, and runoff. *See id.*

165. *See Suitum*, 117 S. Ct. at 1662-63. The agency was created through interstate compact by California and Nevada and approved by Congress in 1969. *See* Pub. L. No. 91-148, 83 Stat. 360 (1969).

166. In 1980 Congress revised the compact to require the TRPA to preserve the environmental and recreational qualities of the region through the adoption of a binding regional plan that barred any development that failed to contribute to attaining or maintaining specific "environmental threshold carrying capacities." *See* Pub. L. No. 96-551, 94 Stat. 3233 (1980). The regional plan, as later amended in 1984 and 1987, attempts to protect the delicate wa-

part, on reducing human impacts in stream environment zones (SEZs),[167] which play an essential role in water flow and filtration, maintaining the area's delicate hydrological balance.[168]

Bernadine Suitum bought a parcel of land in the Tahoe basin in 1972,[169] but when she applied for a building permit in 1989, the TRPA determined that the lot was located entirely within an SEZ, and forbade any "additional land coverage or other permanent land disturbance" on the lot.[170] Suitum sued, claiming that the regulation denied her all economically feasible use of her property and resulted in a categorical taking under *Lucas*.[171] In many ways, Suitum's claim parallels the facts of *Lucas*, in that both cases involved a restriction on development in order to prevent environmental harm.[172]

One major fact differentiates Suitum's claim from that in *Lucas*: although prohibited from developing her property, the TRPA's comprehensive plan allowed Suitum to sell the unused development rights from her property.[173] Suitum refused to participate in the program, calling it a "sham" and claiming

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ter quality of the lake by restricting residential, commercial, and tourist uses in the drainage area. *See Suitum*, 117 S. Ct. at 1662-63.

167. *See* Respondent's Brief at 25aa, *Suitum* (No 96-243).

168. The clarity of the lake is due to the very low level of sediment and nutrients in the water. This results from the relatively small land surface area of the lake's drainage basin and the filtering effect of the SEZs. *See* Respondent's Brief at 2, *Suitum* (No. 96-243).

169. *See Suitum*, 117 S. Ct. at 1660.

170. The TRPA evaluates sites using an Individual Parcel Evaluation System (IPES). *See id.* at 1662. IPES assessments consider several factors, including relative erosion hazard, runoff potential, access, the presence of stream environment zones, the condition of watershed, ability to revegetate, the need for water quality improvements in the vicinity, and the distance from Lake Tahoe. *See IPES—Individual Parcel Evaluation System* (visited Nov. 4, 1998) <http://www.ceres.ca.gov/trpa/ipes.html>. Suitum received the lowest possible IPES score (zero), placing her property in the worst possible category for development. *See Suitum*, 117 S. Ct. at 1662-63.

171. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

172. In *Lucas*, the South Carolina Coastal Council, in order to prevent coastal damage and erosion, established a baseline along the beach beyond which construction of residences was prohibited. As a result, no other economically viable use of the property remained. *See id.* at 1008-09.

173. *See Suitum*, 117 S. Ct. at 1660. The program consisted of three marketable credits that Suitum could sell. One is a residential allocation, which is simply a permit to construct a residence. The second is a residential development right, the right to build a residence on a parcel of land. *See* Respondent's Brief at 8, *Suitum* (No. 96-243). Suitum could also transfer her potential land coverage, the amount of impermeable surface allowed on a particular lot. *See id.*

that the development rights did not provide her a constitutionally sufficient use that could prevent a taking.[174]

The TRPA countered by arguing that Suitum had not ripened her claim because she had not attempted to sell the development rights she was given, and could not, therefore, maintain that they had no value.[175] As a result, the TRPA could not reach a "final decision" as to how she could use her property, nor could the Court know the full economic impact of the regulation on her investment-backed expectations for her property.[176] The Court held that sufficient methods of valuating the TDRs existed to allow a court to decide upon the legality of the regulation.[177] It thus found her claim ripe for review and remanded the case for further proceedings.

Suitum does not provide explicit guidance as to the nature of TDRs, but does avoid the "mitigation" contradiction found in *Penn Central*.[178] Although refusing to deal with the substantive issues directly,[179] the Court implicitly treated the TDRs' valuation as relevant to the determination of whether a taking had occurred.[180] By even bothering to decide that Suitum's claim was ripe because the market could determine the value of her TDRs, the Court seemed to believe that TDRs were relevant,[181] a point with which Justice Scalia and the concurring Justices disagreed.

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174. *See* Petitioner's Brief at 20-21, *Suitum* (No. 96-243).

175. *See Suitum*, 117 S. Ct. at 1664.

176. *See id.*

177. *See id.* at 1668-69. The TRPA's expert real estate appraiser submitted an affidavit stating that the land could be sold for $35,000, and that development rights at similar parcels had sold for prices ranging from $18,500 to $32,000. *See* Respondent's Brief at 140-43, *Suitum* (No. 96-243).

178. The Court specifically avoided ruling on this issue:

> While the pleadings raise issues about the significance of the TDRs both to the claim that a taking has occurred and to the constitutional requirement of just compensation, we have no occasion to decide, and we do not decide, whether or not these TDRs may be considered in deciding the issue of whether there has been a taking in this case, as opposed to the issue of whether just compensation has been afforded for such a taking.

Suitum, 117 S. Ct. at 1662.

179. *See supra* note 178.

180. *See Suitum*, 117 S. Ct. at 1668-70.

181. Chief Justice Rehnquist's position is especially interesting. By not joining in Justice Scalia's concurrence, he essentially abandoned the position taken in his *Penn Central* dissent. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978); *see also supra* notes 160-61 and accompanying text.

Justice Scalia would have held Suitum's claim ripe for review without regard to the TDRs, because he did not feel that TDRs affected the issue of whether a taking had occurred.[182] Justice Scalia believed that the TDRs represented only a regulatory variance, not an actual use of or interest in property.[183] Although he agreed that the TDRs had value, he considered them monetary compensation at best, or a new right exchanged for the taking.[184] He argued that because the question of whether a regulation "goes too far"[185] only refers to the extent to which the land is restricted, not the extent to which the landowner is compensated, TDRs do not affect the determination of whether a taking occurred.[186] Instead, Justice Scalia argued, TDRs merely represent compensation for a taking—in other words, he saw no constitutional distinction between a property owner who receives payment from the government in an eminent domain action, and one who receives payment through the sale of development rights the government has granted.[187]

IV. TDR PROGRAMS PASS TAKINGS TESTS

A. APPLYING CURRENT TAKINGS LAW TO TDR PROGRAMS

1. TDR Programs Sidestep the *Lucas* Categorical Takings Test

The first step in analyzing a TDR program in light of a takings claim requires determining whether the program falls under the categorical takings rule of *Lucas*. The test in *Lucas* boils down to the question of whether the regulation removes one-hundred percent of the value of the property. If so, the analysis ends, and the regulation must be invalidated.[188]

Unfortunately, the Court's analysis in *Lucas* does not point to a clear resolution of the argument, raised by Justice Scalia in

182. *See Suitum*, 117 S. Ct. at 1670 (Scalia, J., concurring).
183. *See id.* at 1671.
184. *See id.*
185. *Id.*
186. *See id.*
187. *See id.*
188. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992).

Suitum, that TDRs do not represent a use of property.[189] The Court in *Lucas* declined to decide exactly which property interests constituted the relevant parcel of property.[190] Because the Court defines property interests according to their usefulness, this question, slightly rephrased, makes up the crux of Justice Scalia's argument in *Suitum*: do the development rights represent a use of the property?[191]

Several mechanical arguments support the assertion that TDRs are real property interests. The simplest of these is the assertion that the right to develop constitutes a stick in the bundle of property rights.[192] While the bundle analogy may illustrate that property interests are divisible,[193] it has never fully defined exactly what rights constitute a full bundle[194] and to what extent they may be divided.[195] However a significant number of courts, legislators, and commentators have accepted and applied the analogy to TDRs.[196] The sheer ease with which a large portion of the legal community has accepted the notion that development rights constitute a severable stick in the bundle supports the idea that TDRs are property rights. At the very least, such widespread acceptance shows that such a conclusion is neither shocking nor absurd.

Ironically, private property rights advocates themselves have asserted that denying the right to develop constitutes the denial of a property right, even if other uses remain in the property. The plaintiffs in *Penn Central*, for example, argued that a restriction from building a skyscraper onto Grand Central terminal denied a property right, although plaintiffs retained several profitable uses from the terminal without further improvement.[197] It would be disingenuous to argue that

189. *See supra* note 183 and accompanying text.

190. *See supra* notes 78-79 and accompanying text.

191. *See supra* note 183 and accompanying text.

192. *See supra* notes 113-16 and accompanying text.

193. *See supra* notes 80-84 and accompanying text.

194. The Court has, however, determined that some interests do not constitute part of the bundle of property rights. *See supra* notes 18-19 and accompanying text (providing examples of potential property uses that do not rise to the level of property rights).

195. One may presume that the infinite possibilities for the development of land do not all constitute legally cognizable interests.

196. *See supra* notes 145, 150-53 and accompanying text.

197. The fact that the *Penn Central* plaintiffs lost does not mean that they were wrong about the right to develop constituting a property right. The Court recognized it as a property right, but held that it was an acceptable deprivation. The Court's balancing test weighs the governmental interest

the right to develop constitutes a real property right if it is the only use denied, but not when it stands alone.

Another argument is that development rights have been treated as property interests for other purposes. For example, the real estate and insurance industries have treated them as property, placing liens on TDRs and also offering title insurance for them. Development rights have been taxed as property, and banks have formed security interests in them. Development rights also bear similarity toward options to buy, which may constitute personal property interests.

The "use" that development rights provide is not diminished merely because it is an economic use rather than a physical use. In weighing takings claims, the courts quickly interpret "use" to mean "value."[198] The Supreme Court's takings jurisprudence measures the economic deprivation a property owner suffers against that owner's reasonable investment-backed expectations.[199] After all, "what is the land but the profits thereof?"[200] TDRs offer an economic use for property by providing a vehicle for profit.[201]

Justice Scalia based his decision on the belief that assigning a development right that a property owner may redeem for cash is no different than the government offering monetary compensation for a taking.[202] This might be the case if the government were conferring a right unrelated to the property interest and the real estate market. This is not the case, however, with TDRs, which give property owners a stake in the free market valuation of the worth of the development transfer out of their property.[203] TDRs provide economic value by allowing the property owner to "use" the property as a means of obtaining profit on the free market—thereby preventing a taking from ever occurring.[204]

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against the value the landowner *retains*, not the extent to which potential value has been lost. *See supra* note 55 and accompanying text.

198. *See supra* notes 55-56.

199. *See supra* note 54 and accompanying text.

200. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992) (quoting 1 E. COKE, INSTITUTES ch. 1, § 1 (1st Am. Ed. 1812).

201. Suitum, for example, could have sold her property and development rights for up to an estimated sum of $67,000. *See supra* note 177.

202. *See supra* note 187 and accompanying text.

203. *See supra* notes 110-11 and accompanying text.

204. *See* Levine, *supra* note 10.

Admittedly, the profit a landowner may realize through the sale of development rights may be considerably less than if the landowner had been allowed to develop the land as he saw fit.[205] However, the Takings Clause does not require that the landowner retain the "highest and best use," but only a reasonable use of the property.[206] At any rate, the *quantity* of use allowed does not enter into the question of whether to apply *Lucas*, under its own terms. Under *Lucas*, it is enough to say that the landowner is left with some viable use of the property.[207] If TDRs constitute any sort of use at all, then *Lucas* does not apply.[208]

2. *Penn Central*

If *Lucas* does not apply, the Court would then perform a *Penn Central* balancing test.[209] Most TDR programs should pass such a balancing test, because they advance substantial state interests[210] while finding a unique way to reduce the burdens on individual landowners.[211]

Governments generally select TDR programs over other land use regulatory devices because a special public interest exists or a problem has defied other solutions.[212] TDR programs across the country have achieved numerous worthy goals, including the preservation of natural resources, agricultural land, historic buildings, or scenic areas. The justifications for TDR programs, therefore, go even beyond the mere "general welfare" that basic land use regulation seeks to serve, and address particularly pressing and thorny community concerns. TDR programs should therefore pass a takings balancing test under *Penn Central*.[213]

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205. For example, Suitum would have to forego the indeterminate but undoubtedly substantial value of a Lake Tahoe home in exchange for an estimated maximum of $67,000 for her development rights. *See supra* note 177.

206. *See supra* note 45 and accompanying text.

207. *See supra* notes 64-69 and accompanying text.

208. *See supra* notes 64-69 and accompanying text.

209. *See supra* note 46 and accompanying text.

210. *See supra* note 46 and accompanying text.

211. *See supra* notes 138-39 and accompanying text.

212. *See supra* note 142 and accompanying text.

213. *See supra* notes 40-60 and accompanying text (describing the *Penn Central* balancing test).

B. AN ALTERNATIVE VIEW: NOT APPLYING CURRENT TAKINGS LAW TO TDR PROGRAMS

The question of whether TDRs comprise a property interest and, therefore, a use under *Lucas* need not be the entirety of a takings analysis. Even if viewed only as a regulatory variance,[214] a well-drawn TDR program may prevent a taking, even if regulations do prohibit all development on a parcel of land. To reach this conclusion, one must step outside of traditional takings law and evaluate TDRs in light of the purposes of the Takings Clause.

As an initial matter, TDR programs alleviate Justice Scalia's fears that private land is being pressed into public service.[215] Within the context of a systematic and comprehensive land use scheme, fears of disproportionately burdening a private individual have less basis.[216] If this is in fact Justice Scalia's concern, then a program that distributes the cost of community benefits across the private sector should dispel it.

Lucas approved of regulations that merely "adjust[ ] the burdens and benefits of everyday life," noting that the Court usually "indulges" in the "assumption" that most regulations do so.[217] The Court found this assumption difficult to make in the case of a total deprivation of use.[218] If the Court is looking to determine whether a regulation shifts the "benefits and burdens of everyday life," it need not always depend upon a mere assumption. TDR programs, by their nature, shift the benefits and burdens of land use regulation. Perhaps more importantly, TDR programs shift the benefits and burdens more equitably than traditional land use regulations.[219]

At times, traditional land use regulations may operate like a sort of lottery for landowners. Some may find their property restricted by regulation that benefits the entire community, while others profit from extensive development and enjoy the benefits of the land use regulation. For example, if a scenic area is regulated to keep development to a minimum, landowners in that area must forego the opportunity to develop the land at a profit. Owners of adjoining land, however, may de-

214. *See supra* note 146 and accompanying text.
215. *See supra* note 69 and accompanying text.
216. *See supra* notes 138-39 and accompanying text.
217. *See supra* note 68 and accompanying text.
218. *See supra* note 68 and accompanying text.
219. *See supra* notes 138-39 and accompanying text.

velop their property at a premium because of its proximity to the scenic area. TDR programs temper this sort of inequity—in the above case, for example, a TDR program would require landowners who wished to develop their property to purchase development rights from the restricted landowners.[220] This allows the community to regulate the development, while shifting some of the costs of the regulation to the benefited parties and avoiding the free-rider problem.[221]

TDR programs fulfill the purposes of the Takings Clause more thoroughly than the narrow application of *Lucas* does, by avoiding the all-or-nothing results that *Lucas* creates.[222] Justice Scalia in *Lucas* admitted that the decision was unfair to those landowners who suffered less than one-hundred percent diminution in value.[223] A landowner who suffers a one-hundred percent loss of the use of his land receives one-hundred percent compensation, while a landowner who suffers a ninety-five percent loss receives nothing.[224] TDR programs provide a way to alleviate this inequity.

Professor John Costonis once described takings jurisprudence as a debate between two opposing groups: (1) the "police power enthusiasts," who favor active government regulation and oppose compensating regulated property owners;[225] and (2) "private marketeers," who favor a laissez-faire attitude toward government regulation and believe that property owners who are restricted by a regulation should be compensated.[226] Professor Costonis argued that this polarity would force government action to extremes, either imposing harsh, uncompensated regulation on landowners, or paying landowners complete compensation for regulation through the eminent domain power.[227] Professor Costonis proved an able predictor, and the *Lucas* categorical rule today imposes an even greater extreme than he envisioned at that time.[228] As a solution to

220. *See supra* notes 138-39 and accompanying text.

221. *See supra* note 140 and accompanying text. TDRs alleviate, to some extent, the problem of those landowners who have been regulated off of their land.

222. *See supra* note 71.

223. *See supra* note 71.

224. *See supra* note 71.

225. *See* John Costonis, *Fair Compensation and the Accommodation Power*, 75 COLUM. L REV. 1021 (1975).

226. *See id.* at 1024-27.

227. *See id.* at 1038.

228. *See supra* note 71.

this dichotomy, Professor Costonis suggested an "accommodation" power, which envisioned land use regulation along a spectrum of intensity.[229]

The application of an accommodation power compromises between the opposite poles of harsh governmental regulations that heavily burden landowners with no compensation and the need to completely compensate landowners for valid regulation.[230] TDR programs have provided a middle ground, and illustrate the viability and desirability of an accommodation power. TDR programs provide a means to balance the costs and benefits of regulation more equitably among all parties.

Under *Lucas*, landowners in a regulated area fall into three groups. First, landowners whose right to use their property is completely restricted receive full compensation for their land. Second, landowners who are heavily affected by a regulation, but retain some use, receive nothing. Finally, those who own adjoining land reap the benefits of the regulation and suffer no detriment. All three groups pay for the regulation equally, because the costs of the regulation must come from general government revenues (taxes).

TDR programs blur the harsh distinctions found in the above scenario. In a TDR program, both of the first two groups would receive some compensation, in proportion to the degree to which the regulation reduced the value of their land and forced them to sell development rights.[231] The exact amount of compensation would depend on the market for development in the area.[232] The costs of the regulation would fall upon those adjoining landowners who benefited from the regulation, who would have to purchase development rights to develop their property further.[233]

The theory of the Tahoe land use plan shows the potential benefits offered by TDRs. Lake Tahoe was being loved to death.[234] As more people crowded in to enjoy the splendor of the lake, the lake lost that splendor.[235] While Suitum may have wanted a home on beautiful Lake Tahoe, her home would

229. *See* Costonis, *supra* note 225, at 1049-55.
230. *See id.*
231. *See supra* notes 123-27 and accompanying text.
232. *See supra* notes 128-27 and accompanying text.
233. *See supra* note 126 and accompanying text.
234. *See supra* notes 162-64 and accompanying text.
235. *See supra* notes 162-64 and accompanying text.

have contributed to the decline of the lake.[236] Eventually, such homeowners would lose the very reason they wanted to live there in the first place.

The TRPA faced a dilemma. It became clear that certain development in stream environment zones had to be restricted. Yet, such restrictions would have harsh effects on landowners like Suitum. As a result, the TRPA could be forced to buy out landowners like Suitum, an expensive proposition in Lake Tahoe. The beneficiaries would be adjoining landowners, who would enjoy increased property values as a result of the regulation, but would bear none of the costs.

The TDR program provides an equitable compromise, and could distribute the burden of the regulation to other landowners. Granted, Suitum would not get to build a house on her property. But the TRPA did not create the environmental crisis that led to the regulation.[237] It did not arbitrarily single out Suitum for harsh regulation, it merely tried to find the fairest method to respond to the demands of the natural environment. It may be unfortunate when nature requires human beings to forego their desires, but at least Suitum was not forced to bear the burden of the regulation alone.

Under Justice Scalia's formulation, the TRPA would face two equally unpalatable options: abandon the regulation, or buy out every landowner in an SEZ. Abandoning the regulations would doom the lake to a slow decay.[238] Attempting to buy out all SEZ properties would likely have the same effect. Given the property values in the Tahoe area, the agency could hardly afford the price of this option, and would have to abandon or sharply curtail the regulation. If that were to happen, everyone would lose.

CONCLUSION

TDR programs may meet the constitutional requirements of the Takings Clause in one of two ways. First, they pass the takings analyses that the Court has currently put in place. TDR programs avoid the categorical takings rule of *Lucas* by providing landowners with an economic use of property.[239] TDR programs meet the goals of the Takings Clause, and avoid

236. *See supra* notes 162-64 and accompanying text.
237. *See supra* notes 162-64 and accompanying text.
238. *See supra* notes 164-68.
239. *See supra* notes 64-66 and accompanying text.

many of the evils that takings law seeks to prevent.[240] TDR programs also pass a balancing test under *Penn Central*, providing benefits to the community that outweigh the economic burden on regulated landowners.[241] This is especially true because the economic burden is distributed among the beneficiaries of the regulation.[242] TDR programs may also find constitutional acceptance by forcing a reconciliation of the extremes found in takings law today. Market-based regulations like TDR programs avoid the twin evils of uncompensated oppressive regulation and forced public compensation in order to achieve valid and pressing community goals.

The innovation represented by TDR regulations benefits both regulators and landowners. Well-drafted TDR programs deserve praise for presenting difficult compromises to thorny land use problems. TDRs do not, however, fit neatly within the boxes that current takings law has provided. Forcing such an outdated and extreme analysis will only serve to stifle regulatory innovation.

240. *See supra* notes 217-19 and accompanying text.
241. *See supra* note 213 and accompanying text.
242. *See supra* notes 211, 219 and accompanying text.